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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 931

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS; William L. Mitchell, Chairman, John Woelk, and Harry G. Wiles, as members of said Commission, and Their Respective Successors in Office,
Petitioners,

vs.

BARTLETT AND COMPANY, GRAIN,
a Missouri Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT C. LONDERHOLM,
Attorney General of the State of Kansas,
State House,
Topeka, Kansas,

E. EDWARD JOHNSON, General Counsel,
State Corporation Commission of the State of Kansas,
State Office Building,
Topeka, Kansas,

BYRON M. GRAY,
700 KPL Tower,
Topeka, Kansas,
Counsel for Petitioners.

February, 1965

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3030

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. .....

STATE CORPORATION COMMISSION OF THE STATE OF KANSAS; William L. Mitchell, Chairman, John Woelk, and Harry G. Wiles, as members of said Commission, and Their Respective Successors in Office,
Petitioners,

vs.

BARTLETT AND COMPANY, GRAIN,
a Missouri Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, The State Corporation Commission of the State of Kansas, William L. Mitchell, John Woelk, and Harry G. Wiles, as members of said Commission, and their respective successors in office, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on November 27, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals, filed November 27, 1964, attached hereto as Appendix A, is not yet reported. The opinion of the United States District Court for the District of Kansas, dated November 26, 1963, is reported at 223 F. Supp. 975; the opinion of said District Court dated December 5, 1963, has not been reported; they appear in the printed record in the Court of Appeals, filed herewith, at pages 9 and 19, respectively, thereof.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Are intrastate movements of grain to a terminal elevator transformed into interstate movements solely because the owners of the grain hold it at the terminal elevator exclusively for mixing, blending, and resale to subsequent purchasers located in other states?

STATUTES INVOLVED

K.S.A. 66-,108(e); K.S.A. 66-1,108(g); K.S.A. 66-1,111; K.S.A. 66-1,112; K.S.A. 66-1,112(a); K.S.A. 66-1,114; K.S.A. 66-1,115; K.S.A. 66-1,116; 49 U.S.C. § 303(b). Pertinent portions are set forth as Appendix B hereto.

STATEMENT

Respondent, Bartlett and Company, Grain, a Missouri corporation, (Bartlett) owns country elevators in Kansas where it purchases grain from local farmers and subsequently hires motor vehicle operators to transport the grain intrastate from these country elevators to its terminal elevator on the Kansas side of the Missouri River. The grain is held at this terminal elevator for resale exclusively to purchasers located outside the State of Kansas. When a sale is made, the grain is mixed and blended to meet the specifications of the purchaser and shipped out by barge or rail to the interstate purchaser (R. 5-8).

Bartlett instituted this action in the United States District Court for the District of Kansas to enjoin petitioners from exercising regulatory jurisdiction over the trucks moving the grain inbound to the terminal elevator (R. 1), predicating Federal jurisdiction upon diversity of citizenship and more than $10,000.00 involved; and upon the allegation that the Constitution and laws of the United States are involved. Concluding that the movement intrastate into the terminal elevator was a part of an interstate movement, the District Court enjoined petitioners from exercising their jurisdiction (R. 19-31). The United States Court of Appeals, Tenth Circuit, affirmed (App. A.).

REASON FOR GRANTING THE WRIT

The decision below, though it attempts to distinguish the two cases, appears to be in direct conflict with the decision of this Court in *Atlantic Coast Line R. R.* v. *Standard Oil Co.*, 275 U.S. 257, 48 S. Ct. 107, 72 L. Ed. 270 (1927). There Standard was purchasing oil from refineries in

Louisiana and Mexico. The oil was transported by tank steamer, pipeline, and rail to storage tanks owned by Standard in Port Tampa, Tampa, and Jacksonville, Florida. The oil then was held in these tanks solely for subsequent movement to customers of Standard in Florida. The railroad contended that as it was the intent of Standard at all times eventually to continue the journey of the oil to these customers, the movement outbound was merely a continuation of the original inbound interstate movement and hence subject to interstate rates. Standard contended that when the oil reached its storage tanks in Florida, the oil came to rest, and the outbound movement was intrastate and subject to payment of the lower Florida intrastate rates. This Court, sustaining Standard's contention, held that the movements out of the storage points were clearly intrastate. The court held that the controlling fact was that the plan contemplated deliveries of oil into storage for convenient later distribution to bulk stations according to customers' requirements, without identifying or labeling any particular oil when it came into storage with any particular customer.[1]

In the present action, the Court of Appeals failed to observe that the question here is identical with the question in the *Standard* case, i.e., did the commodity come to rest when it went into storage to await the needs of unidentified customers as their needs might arise? The Court attempted to find a distinction in the fact that in *Standard* the interstate movement preceded the intrastate movement, where-

1. Judge Hand, in *Baltimore & O. R. Co. v. U. S.*, 15 F. Supp. 674 (1936), treated the *Standard* case, *supra*, as having overruled an earlier case, *Railroad Comm. v. Worthington*, 225 U.S. 101 (1912), if the two cases be considered in conflict on the ruling in *Standard* that "a break in the journey at a selling depot was alone enough to break a continuous journey and submit the transportation to local regulation". (l.c. 677)

as here the reverse is true. It states "However in this cited case [Standard] the delivery of the oil to Florida clearly marked the end of the journey of the oil in foreign commerce." (App. A) Had the Court omitted the words "in foreign commerce", it would have perceived its error, for the question in each case is: Did the delivery into storage "mark the end of the journey"? If so, the character of the inbound movement was determined then and there, leaving the character of the outbound movement to be determined on its own facts. In either case, the question is whether the arrival at the storage point ended the original movement. If it did, as this Court held in *Standard*, then the outbound movement is not affected by the character of the inbound movement and, necessarily, the character of the inbound movement is not affected by the character of the outbound movement. If, in *Standard*, the arrival of the oil into storage "marked the end of the journey", then in the present case the arrival of the grain into storage equally "marked the end of the journey" and in ending the journey it established the intrastate character of the inbound movement.

The laws of the State of Kansas require those trucking grain for hire to procure certificates or permits from, and to file their rates and charges with these petitioners. (App. B) The hauling of grain is not exempted from the mandates of these laws. The Interstate Commerce Act, on the other hand, while providing general regulation under the jurisdiction of the Interstate Commerce Commission of those engaged in interstate trucking for hire, exempts trucking of grain from such regulation. (App. B) The truckers here, hauling the grain exclusively intrastate in Kansas, seek to evade the operation of the laws of the State in which they operate by bringing themselves under the exemption provided in the Federal law for those engaged in interstate trucking of grain.

As the situation stands, petitioners are enjoined by the District Court order from carrying out duties enjoined upon them by the laws of the State of Kansas. The decision of the District Court and the decision of the United States Court of Appeals appear to be in direct conflict with the controlling decision of this Court on the subject. By reason of the order enjoining them from enforcing the Kansas statutes, the State of Kansas is unable to regulate the trucking of grain between country and terminal elevators in the State. As the federal statutes do not attempt to regulate this activity, this important commerce is at present beyond the reach of any regulation.

If the *Standard* case is still the law, it can be made effective in the jurisdiction of the Tenth Circuit only by this Court reversing the decision herein. At present, the decision of the United States Court of Appeals has the effect of establishing the doctrine of this case as the law in the Tenth Circuit.

The importance of knowing with certainty the legal consequences of accumulating goods in storage for later resale and movement interstate seems self-evident. It is the common method of accumulating and distributing goods. Wholesalers, jobbers, and merchants daily transport all manner of goods to central points for accumulation and later resale and distribution to their customers. The question as to whether State or Federal law governs intrastate transportation into these wholesale merchandising points is thrown into uncertainty by the decision herein. The Court should grant certiorari to remove this uncertainty.

CONCLUSION

For the above reasons, this petition for certiorari should be granted.

Respectfully submitted,

ROBERT C. LONDERHOLM,
Attorney General of the State of Kansas,
State House,
Topeka, Kansas,

E. EDWARD JOHNSON, General Counsel,
State Corporation Commission of the
State of Kansas,
State Office Building,
Topeka, Kansas,

.....

BYRON M. GRAY,
700 KPL Tower,
Topeka, Kansas,
Counsel for Petitioners.

February, 1965

"APPENDIX A"

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7938 — NOVEMBER 1964 TERM

STATE CORPORATION COMMISSION OF KANSAS; RICHARD C. BYRD, Chairman; ALVIN F. GRAUERHOLZ and HARRY G. WILES, as Members of said Commission; and their respective successors in office,

Appellants,

v.

BARTLETT AND COMPANY, GRAIN, a Missouri corporation,

Appellee.

} Appeal from the United States District Court for the District of Kansas.

Robert C. Londerholm. Prairie Village, Kan., for Appellants.

Charles B. Blackmar, Kansas City, Mo. (Erle W. Francis, Topeka, Kan. and James H. McLarney, Kansas City, Mo. with him on the Brief), for Appellee.

Before BREITENSTEIN, HILL and SETH, Circuit Judges.

SETH, Circuit Judge

Appellant, the State Corporation Commission of Kansas, is charged with the duty of administering the laws of

Kansas relating to motor carriers. Kan. G. S. § 66-139 (1949). The Commission is here attempting to assert jurisdiction over the appellee by requiring it to comply with rates set by the Commission for truck shipments of grain within Kansas. This is an appeal from a judgment of the United States District Court for the District of Kansas which restrained and enjoined the appellant from exercising such jurisdiction.

The stipulation of the parties shows the facts to be as follows: The appellee, Bartlett and Company, Grain, is a Missouri corporation, licensed to do business in Kansas, engaged in warehousing and merchandising grain. It operates "country elevators" in Kansas near where grain is produced, and in addition operates an elevator known as River Rail Terminal Elevator at Kansas City, Kansas. This terminal elevator is equipped for receiving grain by rail and truck, and for shipping grain by truck, rail, and barge.

All of the grain involved in this action is unprocessed wheat, corn, rye, barley, grain sorghums, and soybeans. It is purchased by the appellee either at its country elevators or at other interior points in Kansas and transported by truck to River Rail also in Kansas. The trucks in which the grain is moved are neither owned nor operated by appellee, but are owned by various common, contract, and private carriers with whom appellee negotiates individually.

When the grain is delivered from the trucks at River Rail it is graded, tested, and deposited in a separate group of "truck" bins, used only for such purpose. This trucked grain is held exclusively for resale to customers located outside Kansas. Later, after it is deposited in the bins, the grain is mixed and blended in order to maintain and improve its quality and to provide accurately classified grain

to meet the specifications of appellee's customers. During the harvest season truck shipments increase, but they take place during the entire year. The outbound shipments from River Rail proceed regularly throughout the year. While the appellee may have outstanding contracts for grain of certain grade and quality, no truckload or shipment is obtained to fill any particular outstanding contract.

The primary question to be decided in determining whether appellant may assert its jurisdiction over the rates charged by truckers carrying these shipments of grain to River Rail is, of course, whether the truck shipments are in intrastate or interstate commerce. It is well established that goods ultimately destined for shipment to another state acquire the character of interstate commerce as soon as they begin their journey, even though there is a temporary break in transit in the state of origin. However, this halt is an incident of the interstate movement. Texas & N.O.R.R. v. Sabine Tram Co., 227 U.S. 111, 33 S. Ct. 229, 57 L.Ed. 442; Chicago Board of Trade v. Olsen, 262 U.S. 1, 43 S.Ct. 470, 67 L.Ed. 839. The principle applicable in determining whether a shipment is one in interstate commerce was stated by this court in Wycoff v. Public Service Comm'n of Utah, 195 F.2d 252 (10th Cir.): "If there is a continuing intent that the goods shall be transported until they reach a designated place, the entire transportation is a continuing one, notwithstanding that there may be a temporary stoppage enroute for a particular purpose." The court then cited United States v. Erie R.R., 280 U.S. 98, 50 S.Ct. 51, 74 L.Ed. 187.

In the case of Texas v. Anderson, Clayton & Co., 92 F.2d 104 (5th Cir.), the Court of Appeals for the Fifth Circuit was confronted with a case very similar on its facts to the present case. The plaintiff there was a dealer in raw cotton who entered into contracts to supply cotton

to out of state buyers. In order to fill these orders, it would purchase cotton and have it shipped to Houston. There it was weighed, sampled, classed, and assigned with similar cotton to orders in hand for shipment to foreign countries or states other than Texas. If it had not already been done, the cotton was compressed to high density. It was then shipped by ocean carrier usually after a delay of seven to eight days after receipt in Houston. The court there held that when the cotton was purchased and shipped to Houston it was the intention of the plaintiff that it would be ultimately shipped to other states and foreign countries. The court further held that the intention existing at the time the movement starts governs and fixes the character of the shipment, and temporary storage within the state of origin made necessary in furtherance of interstate shipment does not change its character. In the cited case the court placed emphasis on the fact that the cotton was already sold to out of state buyers before it was shipped to Houston. However, this fact is not determinative in itself, but is important because it demonstrates a continuing intent that the cotton remain in interstate commerce. In the case at hand, the stipulation of the parties shows that the grain was not always purchased to fill existing contracts out of state before it was shipped to the River Rail Terminal Elevator; nonetheless, all of the grain purchased for the truck bins was in fact eventually shipped to out of state purchasers. The record does not reveal a single instance where this was not the case. This certainly demonstrates an original intent to move it in interstate commerce, and the deposit at the terminal elevator and the handling there did not change the character of the movement.

The United States Supreme Court, in Chicago Board of Trade v. Olsen, 262 U.S. 1, 43 S.Ct. 470, 67 L.Ed. 839,

held that the mere fact that grain in interstate commerce underwent temporary storage, inspection, weighing, grading, or mixing, and changing of ownership or destination, before continuing on to its destination, although it did not prevent the local taxation of the grain, did not take it out of interstate commerce so as to deprive Congress of regulatory power over it. Thus in the case at hand from the time of purchase and shipment to River Rail until the time it was sent to out of state buyers, the activities in connection with the grain were performed in furtherance of a clear intent that it ultimately be delivered to a buyer outside of Kansas. The shipment to River Rail was but the commencement of this movement.

The appellant contends that the decision of the United States Supreme Court in Atlantic Coast Line R.R. v. Standard Oil Co., 275 U.S. 257, 48 S.Ct. 107, 72 L.Ed. 270, is controlling, and that the trial court erred in failing to follow that decision. However in this cited case the delivery of the oil to Florida clearly marked the end of the journey of the oil in foreign commerce. When the oil reached the storage places in Florida, this inventory of oil was solely for local sale and distribution. On the other hand, in the present case there is a continuing intent that the grain remain in interstate commerce until it reaches its destination at some point outside of the state of Kansas, and thus the truck shipment with which we are here concerned is in interstate commerce.

In its brief, appellant presents its case solely on the ground that the movement of grain here involved is not in interstate commerce and does not present an argument on whether the federal government has in the Motor Carrier Act preempted the field. The trial court held that the Act purports to exercise complete jurisdiction, and no control of the rates remains in the state regulatory system.

Appellee in its brief argues that the decisions of the Supreme Court demonstrate that the trial court was correct in finding federal preemption.

It is well established that Congress may direct that federal regulation occupy only a limited portion of the particular activity being conducted in interstate commerce. See *e.g.*, Kelly v. Washington, 302 U.S. 1, 58 S. Ct. 87, 82 L.Ed. 3. The commerce clause does not wholly withdraw from the states the power to regulate matters of local concern with respect to which Congress has not exercised its power even though such state regulation may affect interstate commerce. California v. Thompson, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219. Many cases define the standards to be applied in instances where there is some federal statutory regulation of the subject, and where there is none.

Part II of the Interstate Commerce Act, 49 U.S.C.A., §§ 301-327 (the Motor Carrier Act), rests comprehensive regulatory powers with the Interstate Commerce Commission over the transportation of property by truck in interstate commerce. It is provided at 49 U.S.C.A. § 303(b) that except for the sections relating to qualifications and hours of work of drivers and safety of operation or standards of equipment, the Act shall not apply to motor vehicles engaged in hauling certain classes of property. These exceptions include motor vehicles used to carry non-manufactured agricultural commodities. The Supreme Court in East Texas Motor Freight Lines v. Frozen Food Express, 351 U.S. 49, 76 S.Ct. 574, 100 L.Ed. 917, stated that the purpose of this exception was to preserve for the farmers low cost transportation and refers to its legislative history. In California v. Thompson, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219, the Court considered also the effect of an exception in the Act, now no longer in force, of share-the-ride agencies, and it there decided that such exception did not

preclude California from regulating such agencies. The Court referred to its prior highway safety and police power cases, and also pointed out the fraud to be prevented by the state regulation. This exception and state regulation appear to have been considered by the Court as a matter of local concern and of the police power of the state. The Supreme Court again considered the same activity after Congress had removed the exemption. California v. Zook, 336 U.S. 725, 69 S.Ct. 841, 93 L.Ed. 1005. The Court there considered the preliminary test to be uniformity versus locality or whether state interest is outweighed by national interest.

In the case at bar, the state interest is outweighed by the national interest. This case does not involve the exercise by the state of its powers over health and safety nor to protect its roads, as in Maurer v. Hamilton, 309 U.S. 598, 60 S.Ct. 726, 84 L.Ed. 969, and South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed 734. It is a proposed state regulation of rates and this has "commercial aims." Maurer v. Hamilton, supra. This might be considered to be a matter requiring exclusive federal regulation, under Ohio R.R. Comm'n v. Worthington, 225 U.S. 101, 32 S.Ct. 653, 56 L.Ed. 1004, or under The Minnesota Rate Cases, 230 U.S. 352, 33 S.Ct. 729, 57 L.Ed. 1511, but in any event we hold that Congress intended the federal regulation and the exceptions to occupy the entire field, and be protected as found by the trial court. Although not free from doubt, the discussion of the exception here concerned by the House of Representatives as a Committee of the Whole shows the intention was that trucks hauling non-manufactured agricultural products in interstate commerce be not regulated at all as to matters other than the qualification and hours of work

of drivers and safety of operation or equipment standards.[1] This exception is of a different nature and purpose from the one concerned in California v. Thompson, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219, and California v. Zook, 336 U.S. 725, 69 S.Ct. 841, 93 L.Ed. 1005.

We therefore hold that the federal government by the Motor Carrier Act has preempted the regulation of the carriers here concerned, and the exception from regulation is to prevail as against the attempt made here by the state of Kansas to regulate the carriers hauling unprocessed grains.

AFFIRMED.

Judgment

No. 7938

Ninth Day, November Term, Friday, November 27th, 1964.

Before Honorable Jean S. Breitenstein, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

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1. Representative Holmes, a member of the House subcommittee which had held extensive hearings on the Act stated that the exception was to avoid any regulation whatsoever of the hauling of unprocessed agricultural products:

"MR. GILLETTE. That being the case, what was the object in providing an exemption for carriers of livestock exclusively or farm products exclusively? Why not regulate that? What was the object of the exemption?

"MR. HOLMES. The object was to help the farmer and keep him out of any regulation whatsoever insofar as handling unprocessed agricultural products or livestock on the farm. As an individual owner he would be exempt anyway and would not come under the provisions of the bill." 79 Cong. Rec. 12213, Part 11 (1935).

The subsequent discussion also indicates the intention that the carriers here concerned be not regulated.

APPENDIX B

K.S.A. 66-1,108.

Transportation by motor carriers; definitions. . . .

(e) The term "public motor carrier of property" when used in this act shall mean any person who holds himself out to the public as willing to undertake for hire to transport by motor vehicle, from place to place, the property of others who may choose to employ him.

(g) The term "contract motor carrier of property" when used in this act shall mean any person engaged in the transportation by motor vehicle of property for hire and not included in the term "public motor carrier of property" as herein defined.

K.S.A. 66-1,111.

Types of carriers which must comply with act and other applicable laws. No public motor carrier of property or passengers, contract motor carrier of property or passengers for hire or private motor carrier of property shall operate any motor vehicle for the transportation of either persons or property on any public highway in this state except in accordance with the provisions of this act, and other applicable laws.

K.S.A. 66-1,112.

Authority of commission to license, supervise and regulate motor carriers. The commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers in this state, and to fix and approve

reasonable maximum or minimum, or maximum and minimum rates, fares, charges, classifications and rules and regulations pertaining thereto. And the commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers in this state, and to regulate and supervise the accounts, schedules, service and method of operation of same; to prescribe a uniform system and classification of accounts to be used; to require the filing of annual and other reports and any other data; and to supervise and regulate "public motor carriers of property and passengers" in all matters affecting the relationship between such "public motor carriers of property or of passengers" and the traveling and shipping public.

The commission shall have power and authority, by general order or otherwise, to prescribe reasonable and necessary rules and regulations governing all such motor carriers. All laws relating to the powers, duties, authority and jurisdiction of the corporation commission over common carriers are hereby made applicable to all such motor carriers except as herein otherwise specifically provided.

K.S.A. 66-1,112a.

Contract motor carrier permits. Upon the filing of an application for a permit and compliance with all lawful requirements, the commission is hereby vested with power and authority to grant permits to contract motor carriers; to supervise and regulate such motor carriers for the purpose of promoting safety upon the highways and the conservation of their use; to regulate and supervise the accounts and method of operation of same; to prescribe such rules and regulations as it may deem necessary to carry out the provisions of this act; and to supervise and

regulate all contract motor carriers of property or of passengers and all matters affecting the relationship between such motor carriers and the traveling and shipping public and other carriers.

K.S.A. 66-1,114.

Public motor carrier of intrastate commerce must first secure a certificate; application; hearing. It shall be unlawful for any public motor carrier to operate as a carrier of intrastate commerce within this state without first having obtained from the corporation commission a certificate of convenience and necessity. . . .

K.S.A. 66-1,115.

"Contract motor carriers of property or passengers" and "private motor carriers of property" must secure licenses or permits. It shall be unlawful for any "contract motor carrier of property or passengers" or "private motor carrier of property" to operate as a carrier of property or passengers within this state either in intrastate commerce or in interstate commerce without first having obtained from the corporation commission a license or permit therefor. . . .

K.S.A. 66-1,116.

Public motor carriers operating as common carriers of interstate commerce must furnish certain information. It shall be unlawful for a public motor carrier of property or of passengers, a contract motor carrier of property or of passengers, or a private motor carrier of property, to operate in interstate commerce within this state, without having furnished the corporation commission, in writing, full information concerning:

(a) The ownership, financial condition and equipment to be used and the physical property of the applicant;

(b) the complete route over which the applicant desires to operate;

(c) the proposed rates, schedule or schedules, and/or time cards of the carrier;

(d) such other information as the commission may request covering observance of state police regulations and the payments of the fees for the use of the highways, and upon receipt of such information and the payments of fees the commission may issue such interstate carrier a license: *Provided,* That this act shall apply to all persons and motor vehicles engaged in interstate commerce only to the extent permitted by the constitution and laws of the United States.

49 U.S.C. § 303(b)

Vehicles excepted from operation of law.

(b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation; . . .

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Petitioners,

vs.

BARTLETT AND COMPANY, GRAIN,
a Missouri Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES B. BLACKMAR,
JAMES H. MCLARNEY,
1500 Commerce Building,
Kansas City, Missouri,
ERLE W. FRANCIS,
V.F.W. Building,
214 W. 6th Street,
Topeka, Kansas,
Counsel for Respondent.

R. L. MIDDLEBROOKS, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-2080

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BARTLETT AND COMPANY, GRAIN, a Missouri Corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals is reported 338 F.2d 495.

QUESTIONS PRESENTED

1. Are preliminary truck movements of grain from country elevators to a terminal elevator in the same state subject to state regulation of rates and operating authorities, when the shipper from the beginning has a fixed intention to reship all of the grain from the terminal elevator by rail or water to points in other states?

2. Did Congress in enacting the Motor Carrier Act, (Part II of the Interstate Commerce Act, 49 U.S.C., Sec. 301-327) preempt the field, so that state regulation of rates and operating authorities for any segment of an interstate shipment of agricultural products is precluded by the provisions of the federal act exempting shipments of these products from such regulation?

STATEMENT OF THE CASE

We adopt the following statement as contained in the opinion of the Court of Appeals (A1, 2):

> "[Petitioner], the State Corporation Commission of Kansas, is charged with the duty of administering the laws of Kansas relating to motor carriers. Kans. G.S. §66-139 (1949). The Commission is here attempting to assert jurisdiction over the [Respondent] by requiring it to comply with rates set by the Commission for truck shipments of grain within Kansas. This is an appeal from a judgment of the United States District Court for the District of Kansas which restrained and enjoined the appellant from exercising such jurisdiction.
>
> "The stipulation of the parties shows the facts to be as follows: The [Respondent], Bartlett and Company, Grain, is a Missouri corporation, licensed to do business in Kansas, engaged in warehousing and mer-

chandising grain. It operates 'country elevators' in Kansas near where grain is produced, and in addition operates an elevator known as River Rail Terminal Elevator at Kansas City, Kansas. This terminal elevator is equipped for receiving grain by rail and truck, and for shipping grain by truck, rail, and barge.

"All of the grain involved in this action is unprocessed wheat, corn, rye, barley, grain sorghums, and soybeans. It is purchased by the [Respondent] either at its country elevators or at other interior points in Kansas and transported by truck to River Rail also in Kansas. The trucks in which the grain is moved are neither owned nor operated by [Respondent], but are owned by various common, contract, and private carriers with whom [Respondent] negotiates individually.

"When the grain is delivered from the trucks at River Rail it is graded, tested, and deposited in a separate group of truck' bins, used only for such purpose. This trucked grain is held exclusively for resale to customers located outside Kansas. Later, after it is deposited in the bins, the grain is mixed and blended in order to maintain and improve its quality and to provide accurately classified grain to meet the specifications of [Respondent's] customers. During the harvest season truck shipments increase, but they take place during the entire year. The outbound shipments from River Rail proceed regularly throughout the year. While the [Respondent] may have outstanding contracts for grain of certain grade and quality, no truckload or shipment is obtained to fill any particular outstanding contract."

The pleadings contain the following admission (R. 2, 4):

". . . [Petitioners] have sought to impose upon the plaintiff . . . the scheme and program of regulation as prescribed by the laws of the State of Kansas. These laws provide that no common or contract carrier may transport grain for hire within the State of Kansas

without authority from the defendant Kansas Corporation Commission, and at rates prescribed and approved by that commission. . . ."

Kansas Statutes Annotated, Sec. 66-1116(d) (Pet. App. 11-12), provide that the Kansas statutes apply

". . . to all persons and motor vehicles engaged in interstate commerce only to the extent permitted by the constitution and laws of the United States. . . ."

Jurisdiction of the District Court was invoked not only under 28 U.S.C., §1331, as set out by petitioners (Pet. 3), but also under 28 U.S.C., Sec. 1337, on the ground that the case arises under the Motor Carrier Act, an Act of Congress regulating commerce.

The questions in this case, then, involve only federal law. Are the regulations of rates and operating authorities which the state seeks to enforce permitted by the Constitution and laws of the United States? Both of the courts below answered in the negative.

ARGUMENT

1. The lower courts correctly applied the controlling decisions of this Court in holding that a preliminary leg of a journey constitutes interstate commerce even though it is wholly within one state, if the shipper at all times intends reshipment to points in other states.

We will not say that a question of the permissible extent of state regulation under the Commerce Clause lacks importance. These petitioners, however, seek to relitigate a point which has been settled for more than fifty years by consistent holdings of this court.

The controlling decisions are *Railroad Commission* v. *Worthington*, 225 U.S. 101 (1912); *Texas and New Orleans Railroad Co.* v. *Sabine Tram Co.*, 227 U.S. 111 (1913) and *Railroad Commission* v. *Texas and Pacific Railway Company*, 229 U.S. 336 (1913). Each involved the precise question here in issue—that of the authority of a state to regulate rates and operating authorities of a preliminary intra-state leg of an interstate journey. In each it was held that state regulation was precluded by the commerce clause of the constitution. All were unanimous decisions. They have been cited literally dozens of times, and continue to be cited.

The rule of the cases is that the intent of the shipper at the time of commencement of the initial shipment is controlling. If this intention is to ship in interstate or foreign commerce, then the entire shipment is subject only to federal regulation and is free from state regulation of rates and authorities.

Under these decisions, it is of no significance: (a) that the precise interstate destination may not be known at the time the initial shipment begins; (b) that the product may be accumulated or stored at an intermediate point until orders can be obtained or shipping arranged; or (c) that contracts for resale may not be made until after the termination of the initial leg.

Operations at the intermediate point which are incidental to and in furtherance of commerce do not change the effect of the rule of the cases just cited. In *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1 (1923), this Court held that the normal and usual activities of a terminal grain elevator, including ". . . storing, inspecting, weighing, grading or mixing and changing the ownership, consignee or destination . . ." (l. c. 33), do not take the grain out of commerce.

The operations at the intermediate terminal elevator in this case are the same as those described in the *Olsen* opinion.[1]

Since the decision of both lower courts is consistent with an unbroken line of authority, no need for further review is evident.

2. The Atlantic Coast Line Case is based on the express finding that interstate commerce had come to an end, and it is therefore clearly distinguishable.

The petitioners, just as in the Court of Appeals, place virtually their entire reliance on *Atlantic Coast Line Railroad Company* v. *Standard Oil Company*, 275 U.S. 257 (1927). That case is not in conflict with the cases cited in our first point, and, as a matter of fact, is quite consistent with them.

In *Atlantic Coast Line* sellers of petroleum products had caused them to be shipped by water from points in other states and foreign countries, to storage tanks owned by Standard Oil of Kentucky at coastal points in Florida. Kentucky Standard's entire business in that state (l.c. 267) consisted of the intra-state sale and distribution of these products. It owned the coastal tanks, bulk stations, and local service stations in the state, and made sales at wholesale and retail. It was simply a local merchant (even though a very large one), and this Court held, therefore, that interstate commerce had come to an end with the delivery to it at its coastal tanks.

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1. When the shipper intends interstate shipment from the inception, only a change in the nature of the article through a manufacturing process will have the effect of breaking the continuity of the interstate movement. *Arkadelphia Milling Co.* v. *St. Louis SW Ry. Co.*, 249 U.S. 134 (1919). This record shows nothing like that. Both the initial and the subsequent shipments consist simply of unmanufactured grain.

Subsequent rail shipments by Kentucky Standard to its bulk stations were therefore found to be intra-state shipments subject to state regulation. The decision turned not on the nature of the operations of the coastal terminal, but on the determination of the point at which interstate commerce ended.

There the initial seller-shippers had no intent at all except that of making delivery at the coastal storage tanks, at which point their duties ended with the passage of title to the local purchaser. Cases which turn on the intent of the shipper at the time of the first shipment would not govern a situation as to which that shipper had no concern or intent.

The *Atlantic Coast Line* opinion, by the same token, could have no application to a case such as this one, in which the Court of Appeals found a clear intent from the time of the initial shipment that the grain "ultimately be delivered to a buyer outside of Kansas. . . ."

The petitioners' assertion that there is no difference between a local leg at the beginning of an interstate movement, and an intra-state journey following delivery to the local consignee is at variance with the holding of this court in *Schechter* v. *United States,* 295 U.S. 495 (1935), decided in reliance on the *Atlantic Coast Line* opinion. There the Court found that interstate commerce in poultry had ceased following sale to a local processor. The opinion stated (l.c. 543):

> ". . . Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a state temporarily *and are later to go forward in interstate commerce* . . . are not applicable here. . ." (Emphasis supplied)

Even the *Schechter* opinion, with its narrow conception of the commerce clause, would recognize the shipments shown by this record as interstate commerce.

In *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231 (1951), an oil company transported gasoline by water from its refinery in Indiana to its storage tanks at Detroit, Michigan, from which it made deliveries to its local customers. Water shipments were not made "pursuant to orders already taken" (l.c. 237), but in a regular and continuous course in anticipation of the needs of customers. Stocks were accumulated for the winter season when navigation was restricted. This Court expressly distinguished the *Atlantic Coast Line* case and held that sales out of the storage tanks were "sales in interstate commerce," since the seller-shipper intended and initiated a regular and continuous course of interstate shipment.

This holding shows clearly that *Atlantic Coast Line* was not decided on any basis such as is suggested on page 4 of the petition and that the result would undoubtedly have been different if Kentucky Standard had been responsible for the initial water leg of the journey as well as for the subsequent rail trip. *Standard Oil* is much more like this case than is *Atlantic Coast Line*, since the same shipper was responsible for both segments of the journey.

The petitioners' suggestion that the Atlantic Coast Line decision impaired the authority of the *Worthington* case, *supra*, is not well taken. They rely only on a three-judge District Court opinion, in a case decided on another point, so that the comment is the purest dictum. That the authority of *Worthington* is unimpaired is shown by the following: (a) No opinion of this Court has ever

questioned *Worthington*, although it has been cited many times. It was relied on by Chief Justice Taft, the author of the *Atlantic Coast Line* opinion, in his later opinion in *Carson Petroleum Co.* v. *Vial*, 279 U.S. 95 (1929); (b) This Court denied certiorari (302 U.S. 747, 1937) in *Texas* v. *Anderson-Clayton Co.*, (5th Cir. 1937) 92 F.2d 104, which was found by both the District Court and the Court of Appeals to be virtually indistinguishable from the present case. We are mindful of the Court's caution about reading too much into the denial of certiorari, but it seems inconceivable that review would be refused if the lower courts had held state regulation invalid through reliance on cases which this Court considered no longer controlling or authoritative; (c) The opinions in the *Schechter* and *Standard Oil* cases, *supra*, show, moreover, that the *Atlantic Coast Line* case has a rather narrow application and that it made no change in the uniform course of the decisions.

There is simply no conflict between the opinion below and the *Atlantic Coast Line* case, so as to indicate further review by this Court.

3. The Petitioners have shown no reason for questioning the finding of both lower courts that state regulation is precluded by the Motor Carrier Act, 49 U.S.C., Sec. 301-327.

Petitioners complain: ". . . As the federal statutes do not attempt to regulate this activity, this important commerce is at present beyond the reach of any regulation." The trouble with this complaint is that Congress deliberately chose to free carriers of unmanufactured agricultural products from regulation as to rates and operating authorities, so as to preserve for producers the advantages of low-cost motor transportation. See *East Texas Motor Freight Lines* v. *Frozen Food Express*, 351 U. S. 49 (1956). The rates charged for the first leg of

trips of the type here dealt with manifestly affect interstate commerce. The regulation is purely in the interest of the carriers, and does not relate to the use of the highways or other matters of state concern.

Any state regulation of rates and authorities in this area would be at war with the firm Congressional policy of non-regulation. Both lower courts so found, and the issue is analyzed thoroughly in the opinion of the Court of Appeals (A5-A8).

A determination of federal preemption is itself sufficient to support the judgment. Petitioners cite nothing to show that the issue was not correctly decided. Under these circumstances further review would appear to be futile.

CONCLUSION

The judgment below is supported by: (1) the continued course of decision of this Court; (2) the explicit policy of Congress; and (3) sound conception of the purpose and scope of the Commerce Clause. The case out of which petitioners try to conjure a conflict is far wide of the mark.

Further review would serve no useful purpose and certiorari should be denied.

Respectfully submitted,

CHARLES B. BLACKMAR,
JAMES H. MCLARNEY,
1500 Commerce Building,
Kansas City, Missouri,
ERLE W. FRANCIS,
V.F.W. Building,
214 W. 6th Street,
Topeka, Kansas,
Counsel for Respondent.